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## The Global Rise of Judicial Review Since 1945

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## The Global Rise of Judicial Review Since 1945

### Cover Page Footnote

Clayton J. & Henry R. Barber Professor, Northwestern Pritzker School of Law; Visiting Professor of Law, Yale Law School, Fall semester 2013-2020. I have previously written more briefly on this subject in: Steven Gow Calabresi, *The Origins and Growth of Judicial Enforcement*, in *COMPARATIVE JUDICIAL REVIEW* 83 (Erin F. Delaney & Rosalind Dixon eds., 2018). I draw on parts of that book chapter in my article here. I am also publishing a two- volume book series with Oxford University Press in April 2021 on: 1) *The History and Growth of Judicial Review in the G-20 Constitutional Democracies: The Common Law Countries* and 2) *The History and Growth of Judicial Review in the G-20 Constitutional Democracies: The Civil Law Countries*. I retain the copyright to use some of the material in this article in my forthcoming books with Oxford University Press. I want to thank Bruce Ackerman, Guido Calabresi, and Erin Delaney for helpful comments and suggestions on this article.

# THE GLOBAL RISE OF JUDICIAL REVIEW SINCE 1945

*Steven G. Calabresi*<sup>+</sup>

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<sup>+</sup> Clayton J. & Henry R. Barber Professor, Northwestern Pritzker School of Law; Visiting Professor of Law, Yale Law School, Fall semester 2013-2020. I have previously written more briefly on this subject in: Steven G. Calabresi, *The Origins and Growth of Judicial Enforcement*, in *COMPARATIVE JUDICIAL REVIEW* 83 (Erin F. Delaney & Rosalind Dixon eds., 2018). I draw on parts of that book chapter in my article here. I am also publishing a two-volume book series with Oxford University Press in April 2021 on: 1) *The History and Growth of Judicial Review in the G-20 Constitutional Democracies: The Common Law Countries* and 2) *The History and Growth of Judicial Review in the G-20 Constitutional Democracies: The Civil Law Countries*. I retain the copyright to use some of the material in this article in my forthcoming books with Oxford University Press. I want to thank Bruce Ackerman, Guido Calabresi, and Erin Delaney for helpful comments and suggestions on this article.

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Professor Bruce Ackerman's new book, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*,<sup>1</sup> *Volume I*, is a monumental contribution to the nascent field of Comparative Constitutional Law. It is the best and only theoretical treatment of the subject it covers, and the book contains an enormous amount of new research and writings in English of the countries it covers which include: India, South Africa, Italy, France, Poland, Israel, Myanmar, and Iran. It is an invaluable contribution to the field and an exemplary work of scholarship.

Professor Ackerman's book explains how twentieth century revolutions in the countries he studies led to the constitutionalization of charisma—borrowing the terminology of Max Weber. Ackerman explains that revolutionary leaders in the countries he discusses in *Volume I* chose to write constitutions, thus making permanent the charismatic power that they had at Time 1 as revolutionaries. He then notes that actors much later on at Time 2 in those countries were bound and controlled by the written constitutions that revolutionary leaders had entrenched at Time 1.

Professor Ackerman argues that there are three separate paths that modern constitutions have followed since 1945. The first path, which is the sole path discussed in *Volume I*, is the mobilization of a mass movement party by a charismatic leader who leads a charismatic mass movement to overthrow the prior undemocratic and repressive regime and to institute a new regime whereby the charismatic leader constitutionalizes and makes enduring his and his movement's charisma. The second path, which will be discussed in *Volume II*, occurs when powerful elites construct a constitution at Time 1, as happened in Japan and West Germany after World War II, and that elite-written constitution then becomes an enduring document, which people follow and which has legitimacy at Time 2. The third path, which will be discussed in *Volume III*, occurs when a constitution evolves over a long period of time at Time 1, which has happened in the United Kingdom, in Canada, and in Australia. These constitutions are followed and enjoy legitimacy at Time 2 in those respective countries.

I agree with everything that Professor Ackerman says in *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law, Volume I*, but I would add to Professor Ackerman's work a very important caveat, which is that world constitutionalism existed in the nineteenth century and in the twentieth century prior to 1945. What is really striking, in my opinion, about

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1. BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* (2019).

the post-1945 experience is that the constitutionalization of charisma included not only the adoption of written constitutions, but also the adoption, in the countries Professor Ackerman discusses, of meaningful systems of judicial review and of checks and balances. In 1945, only three countries in the world—the United States, Canada, and Australia—had judicial review of the constitutionality of national legislation and a working system of checks and balances.<sup>2</sup> In 1945, the United States was the only nation in the world with a Bill of Rights enforced by judicial review. Today, all of the countries which Professor Ackerman discusses in *Volume I* have not only a written constitution but also: 1) a powerful system of judicial review; 2) a Bill of Rights; and 3) a meaningful system of checks and balances. In Part I, below, I will discuss how the phenomenon of written constitutionalism was widespread in the world during the nineteenth century and during the twentieth century up until 1945. In Part II, I will discuss how all of Professor Ackerman's revolutionary leaders set up: 1) systems of judicial review, and 2) systems of checks and balances. In Part III, I will discuss what caused judicial review to originate and grow in the fifteen of the G-20 Nations, which are constitutional democracies and which Professor Ackerman does not discuss in *Revolutionary Constitutions*. In doing this, I will be summarizing the findings of my own two volume book series entitled *The History and Growth of Judicial Review in the G-20 Constitutional Democracies*, which will be forthcoming with Oxford University Press in 2021.

#### I. WRITTEN CONSTITUTIONS PRIOR TO 1945

Written constitutions were commonplace prior to 1945 even though judicial review of federal legislation for constitutionality existed only in the United States, Canada, and Australia. I will discuss below the experience with written constitutions in: 1) the United States; 2) continental Europe; 3) Asia; 4) Latin America; and 5) the British Empire between 1776 and 1945.

##### A. *The United States*

The first written constitutions in the world were the state constitutions of eleven of the thirteen original states of the United States, which declared their independence from the United Kingdom in the U.S. Declaration of Independence of July 4, 1776. These state constitutions were written and ratified between 1776 and 1787, and they were inspired in part by the written colonial charters, which those states had been governed under when they were British colonies, and in part by the Lockean idea that men should set up a government through a written social contract. Strikingly, most of the eleven states that wrote state constitutions also wrote state declarations of rights that

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2. The tiny, but beautiful country of Switzerland had a democratic constitution with judicial review of cantonal but not federal laws. Switzerland has also had since the nineteenth century a working system of checks and balances.

were far more libertarian and comprehensive than the so-called English Bill of Rights of 1689. These declarations of rights were inspired by the colonists' religious sentiments, by the thinkers of the Enlightenment, and by a desire to prevent certain wrongs that the British had committed in the American colonies from ever happening again.

The thirteen American colonies had, from the founding of the Jamestown colony in 1607, up until the American Declaration of Independence in 1776, been subject to judicial review by the king of England's Privy Council—an elite, small number of English lords. These lords were chosen by the king of England to judicially review all English colonial laws to make certain they were not repugnant to, but were consistent with, the laws of England, to the extent colonial laws diverged from the laws of England.<sup>3</sup> As a result of Privy Council judicial review, the thirteen American colonies became accustomed to having some of their laws struck down for exceeding the scope of the powers delegated to the American colonies by their colonial charters. In 1776, Americans disliked judicial power, which they associated with British imperial rule. But, Americans gave state judges life tenure when they wrote their new state constitutions in 1776. By 1787, Americans were furious with their all-powerful state legislatures, and they supported judicial review of the constitutionality of laws two decades prior to the U.S. Supreme Court's decision in *Marbury v. Madison*.<sup>4</sup>

The original thirteen states thus originated both: 1) the idea of the central importance of a written constitution and bill of rights; and 2) the additional idea that a court could enforce such a written constitution as supreme law by striking down a legislative enactment or an executive action taken by a co-equal legislative or executive branch of that state's government. The first idea about the centrality of written constitutions swept across the globe immediately from 1789 onward.<sup>5</sup> The second idea, about the courts having the power to judicially review legislative acts of a co-equal branch of government, did not become commonplace until well after 1945.<sup>6</sup>

The eleven original written state constitutions, which were written between 1776 and 1787, were soon followed by a written federal constitution called the Articles of Confederation, which set up an extremely weak federal government

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3. MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1965).

4. 5 U.S. 137 (1803). Interview with Gordon S. Wood, Providence RI (Jan. 17, 2020). *See also* SCOTT D. GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787* (2011); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

5. GEORGE ATHAN BILLIAS, *AMERICA CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989* (2009).

6. STEVEN GOW CALABRESI, *THE HISTORY AND GROWTH OF JUDICIAL REVIEW* (Oxford University Press forthcoming in 2021).

for the thirteen rebellious states. That federal government won the American War of Independence, and it signed a peace treaty with the United Kingdom in 1783, in which the U.K. recognized American independence and ceded any claims it had to land in the areas that would eventually become the states of Ohio, Indiana, Illinois, and Michigan. The federal government under the Articles of Confederation proved to be too weak because: 1) it had no power to regulate internal and external commerce; 2) it had no power to assess taxes or directly regulate American citizens; and 3) it was only amendable by unanimous consent, which could not be obtained because, for example, tiny Rhode Island vetoed an amendment passed by the other twelve states to give the Continental Congress the power to regulate internal and external commerce.

As a result, a federal Constitutional Convention was held in Philadelphia, Pennsylvania, in 1787, which wrote the current Constitution of the United States. The new constitution created: 1) a much more powerful federal government; 2) a Madisonian system of checks and balances to prevent that new, more powerful, federal government from abusing power; 3) a system of judicial review by the federal and state courts of the constitutionality of both congressional and presidential actions; and 4) a much easier amendment process than the one in the Articles of Confederation. This written federal constitution went into effect on March 4, 1789. In 1791, a written federal bill of rights was added to the U.S. Constitution to address the concerns of those who had opposed the ratification of the new constitution out of fear that it would make the national government too powerful. This bill of rights was largely copied not from the English Bill of Rights of 1689, but rather from the post-1776 state declarations of rights, which were much more libertarian than were any English constitutional documents.

The written U.S. Constitution and Bill of Rights were amended seventeen times between 1791 and 2018 in critically important ways, especially by the three Reconstruction Constitutional Amendments, which were adopted after the Civil War between 1865 and 1870, and by the Progressive Constitutional Amendments, which were adopted between 1913 and 1920. The Progressive Amendments approved the national government's power to tax income; provided for the direct popular election of U.S. senators; and gave women the right to vote. Other important constitutional amendments since 1920 have limited the president to two four year terms and have expanded the suffrage further.

The written U.S. Constitution, which went into effect in 1789, inspired a wave of constitutionalists all over the world, adopting for their own countries written constitutions. Unfortunately, prior to 1945, no country in the world adopted a written constitution with: 1) a powerful system of judicial review of the constitutionality of national legislative and presidential acts or 2) a meaningful system of checks and balances. As a result, all of the written constitutions inspired by the U.S. example from 1789 to 1945 ended in failure

except for the Canadian Constitution Act of 1867, the Australian Constitution Act of 1901, and the Swiss Constitution of 1874. The plagiarists in other countries who copied the U.S. written constitution of 1789 did a poor job of plagiarizing when it came to judicial review and checks and balances.

*B. The Continental European Experience Prior to 1945*

The continental European experience with written constitutionalism began with the French Revolution. The French revolutionaries adopted a written constitution in 1791, which was the first written constitution ever in that country. It adopted the principle of popular sovereignty and the idea of written constitutionalism. The 1791 Constitution, in turn, was built on a written 1789 Declaration of the Rights of Man and of the Citizen, which became in 1971 a judicially enforceable part of French constitutional law. The Declaration of the Rights of Man and of the Citizen of 1789 was inspired by the American state declarations of rights adopted between 1776 and 1789, which were translated into French and popularized by Benjamin Franklin and Thomas Jefferson, both of whom spent large periods of time in Paris in the 1770s and 1780s.<sup>7</sup>

The French Revolutionary Constitution of 1791 was reluctantly accepted by King Louis XVI. This constitution provided for a separation of powers among the legislative, executive, and judicial powers, although the courts did not have the power of judicial review. When France went to war with the United Kingdom, an insurrection occurred, which led to a national convention being called, which declared France to be a Republic under a dictatorship of the radical French revolutionaries Robespierre, Danton, Marat, and the Paris Commune. This marked the end of the first French Constitution.

Also in 1791, in continental Europe, the country of Poland adopted a written constitution, inspired by the U.S. Constitution, which went into effect on May 3rd. This liberal document inspired enmity from Poland's monarchical and imperial neighbors: 1) Russia, 2) Austria-Hungary, and 3) Prussia. By 1795, those three neighboring countries reapportioned all of Poland by seizing all Polish land for themselves. Poland thus ceased to exist as a sovereign nation state, and its written Constitution of 1791 thus ceased to be governing law after 1795.

From the 1790's until 1815, continental Europe was in an almost constant state of war, first with revolutionary France and then with the French revolutionary dictator, Napoleon Bonaparte. Napoleon conquered the countries of Spain and Portugal, and the Portuguese ruling monarch fled to Brazil, which he governed until 1815. After Napoleon's final defeat at the Battle of Waterloo, the European Monarchies gathered at the Congress of Vienna, determined to stamp out democracy, classical liberalism, and written constitutionalism while restoring feudalism and monarchy. Metternich and the

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7. GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS (Max Farrand trans., 1901).



Congress of Vienna prevailed from 1815 until 1830 in imposing a weak Bourbon monarchy on France, but, in the July Revolution of 1830, the French demanded that a weak constitutional monarch, Louis Philippe I govern them instead of his cousin Charles X who was the rightful holder of the French throne. Also, in 1830, the Belgians rebelled against the Netherlands, and Belgium became an independent country from that time on with a constitutional monarchy like Britain's and like France under Louis Philippe. Belgium adopted a written constitution at this time.

The next major impetus for written constitutionalism came with the Revolutions of 1848, which toppled monarchies all over Europe. These revolutions were all liberal and democratic in nature, and the revolutionaries typically demanded and received written constitutions. The February Revolution of 1848 in France led to the replacement of the constitutional monarch, King Louis Philippe, with the French Second Republic. All the people of France elected a constituent assembly, which adopted a new written constitution on November 4, 1848.

Under this constitution, there was to be a separate legislature called the assembly and a separately-elected president, who would serve a term of four years with universal male suffrage. No provision was made for either judicial review or for checks and balances like: 1) the holding of midterm elections; 2) the creation of regional power centers to offset central power; or 3) the creation of powerful legislative oversight committees with subpoena power. On December 10, 1848, the French stupidly elected Louis-Napoleon, the first Napoleon's nephew, to be the new President of France. In 1851, Louis-Napoleon overthrew France's second written constitution, and he established himself as Napoleon III, emperor and liberal dictator of France.

In Italy, the Revolutions of 1848 led to the brief creation of an independent state in Sicily with a written constitution, and it led to the king of Piedmont, Savoy, and Sardinia agreeing to a written constitution as well, called the *Statuto Albertino* after King Charles Albert who had proclaimed it. The *Statuto Albertino* became the constitution of all of Italy once the Italian nation state was created during the 1860s. The *Statuto* was a written constitution, which was interpreted by the legislature when it passed laws, and it did not give the courts any power of judicial review. It was thus very much like the first and second French Constitutions, which were also written documents that did not give the courts the power of judicial review and which did not set up meaningful separations of power.

The Revolutions of 1848 in March of that year occurred in the south and in the west of Germany. The revolutionaries demanded German unification; freedom of speech and of the press; and, in 1849, a Frankfurt Convention named a document the written constitution of the German Empire. The Frankfurt Constitution was a written constitution, which did not contemplate modern style judicial review of the constitutionality of federal legislation or a

Madisonian system of checks and balances. King Frederick William of Prussia was to be the constitutional monarch of this regime, a role he refused to play.

Ultimately, in 1871, Germany was unified as an empire after it defeated France in the Franco-Prussian War. Bismarck, who advised the Prussian Monarch on all things, designed a written constitution of the German Empire, which did go into effect in 1871 as the constitution of all of Germany. The German Imperial Constitution created a bicameral legislature with the lower house representing the German people and the upper house representing the historical German states of which Prussia was by far the largest and most populous. All power was vested in the emperor and in the upper house of the legislature, and there was no provision for judicial review and no self-conscious effort to create a system of checks and balances.

The German Imperial Constitution worked well when Bismarck was in power, but when Bismarck was sidelined by the new kaiser, Wilhelm II, the stage was set for a catastrophe. Wilhelm adopted a new and bellicose approach to foreign policy, which ultimately led to World War I, and the overthrowing of the German monarchy. World War I destroyed many of the brightest and best minds of Germany, France, and the United Kingdom. It led to the Bolshevik Revolution in 1917 in Russia and to the splintering of the Austro-Hungarian Empire into what are now roughly a dozen separate nation states, all of them badly governed down to the present day.

Meanwhile, in France, Emperor Napoleon III was deposed after France was crushed by Prussia in the Franco-Prussian War of 1870-71. Initially, there was some confusion about what form of government France should opt for after 1871, but, by 1875, a third written French constitution was put in place by legislation, which provided for a popularly elected Chamber of Deputies and a much weaker upper house called the Senate, with a ceremonial president to serve as head of state. Political parties formed in the Chamber of Deputies and elected by 1877 committed opponents of monarchy to all chief offices. The Third Republic became famous for its prime ministers and coalition governments produced by a radical electoral law using proportional representation. Strong executive power was in disgrace after two failed Napoleonic Empires and a failed Bourbon monarchy. The Constitution of the Third Republic did not provide for judicial review of the constitutionality of national legislation nor did it have any meaningful system of checks and balances. It ushered in an age of weak classical liberal governments that would not have survived to win World War I without British and U.S. military help.

In 1919, a militarily defeated Germany adopted the Weimar Constitution, which served as Germany's governing document until the rise to power of Adolf Hitler and the Nazis in 1933. The Weimar Constitution was yet another in a by now long string of continental European constitutions which did not provide for meaningful judicial review of federal legislation; did not contain a strong Madisonian system of checks and balances; allowed for extreme

proportional representation, which made the all powerful lower house of the legislature unmanageable; and which created a president with: 1) much too long a term; 2) the power to rule by emergency decree; 3) no need to worry about powerful state governors, midterm elections, or legislative oversight committees armed with subpoena power; and 4) no moderating national two party system. The result was that the Weimar Constitution failed utterly in that the second and last president of the Republic was not really a believer in democracy, and a series of bizarre events led to the election of the notorious criminal Adolf Hitler as the chancellor or prime minister of Germany. Hitler asked Parliament to delegate all of its legislative and constitutional powers to him and to his cabinet, and in the Enabling Act of March 23, 1933, Parliament complied.

Meanwhile, in Italy, Benito Mussolini came to power in 1922 due to misbehavior by the King of Italy, and within five years he had turned himself into the sole Fascist dictator of Italy. The classical liberal written constitution known as the *Statuto Albertino* proved to be no barrier to Italian fascism because the *Statuto* was enforced by the legislature, which Mussolini controlled. There was in the *Statuto Albertino* no Madisonian system of checks and balances and no independent judicial review of the constitutionality of national legislative and executive acts. The *Statuto Albertino* was thus as ineffectual as the first and second French constitutions and the Constitution of the Weimar Republic in preventing a descent into authoritarian rule.

The final proof that there was a “rise of world constitutionalism” in Europe prior to 1945 came with the adoption by Joseph Stalin, the brutal dictator of the totalitarian Soviet Union, of his 1936 written constitution for the Soviet Union. This written document guaranteed the freedom of speech and of the press, the free exercise of religion, and protection from warrantless searches and seizures as well as guaranteeing such second generation constitutional rights as the right to a job and to health care. The Stalin written Constitution of 1936 was obviously not worth the paper it was written on because it was a propaganda tool that was not followed at all in Stalin’s Soviet Union. The Stalin Constitution, of course, set up no independent system of judicial review of the constitutionality of federal legislation in the U.S.S.R. or of Stalin’s executive orders. The Stalin Constitution also set up no working system of Madisonian checks and balances. It therefore proves that what is distinctive about the post-1945 experience of constitutionalism is not the written constitutionalization of charisma, which Professor Ackerman writes about, but is instead the written constitutionalization of judicial review of federal legislation, of federal executive actions, and of a Madisonian system of checks and balances.

Many of the continental European constitutions involved charismatic leaders like Bismarck in Germany, the founders of the French Third Republic in France in 1875, or Stalin in the U.S.S.R., constitutionalizing their charisma in a written constitution. These constitutions all failed, however, because they did not provide for a Madisonian system of checks and balances and judicial

review of the constitutionality of federal legislation. Some written constitutions, like the Constitution of the French Third Republic, did not set up a powerful enough government to fight off the rise of Hitler's military power from 1933 to 1939. France was powerful enough in 1933 to stop Hitler's rebuilding of the German military on its own, but the weak leaders of the Third Republic failed to act militarily against Hitler in 1933 when they could easily have won. When France did act militarily in 1939, it was too weak to stop Hitler and it was conquered, and the Third Republic was overthrown.

The only continental European constitution which did not degenerate into a tyranny, and which was not overthrown by Hitler and Mussolini, was the Swiss written Constitution of 1874, which borrowed heavily from the U.S. Constitution of 1787. The Swiss Constitution set up a strongly federal system of what are, today twenty-six cantons, with a bicameral federal legislature. The cantons are equally represented in the upper house while representation in the lower house is based on population. There is a multi-member federal executive committee, and an independent judiciary, which can hold cantonal laws unconstitutional but not federal laws. In addition, there is ample provision made for the holding of popular referenda and initiatives.

The Swiss Constitution creates a system of dual federalism that is more federalist than is the U.S. system, and it divides power among a bicameral legislature and three co-equal branches of the national government. The Swiss courts can hold cantonal but not federal laws to be unconstitutional. The Swiss Constitution has survived because it provides for a Madisonian system of checks and balances and for some judicial review of the constitutionality of legislation. The Swiss Constitution was updated in 1999, but it retains all of its checks and balances features.

### *C. The Asian Experience Prior to 1945*

The Asian country of Japan was the first country on that continent to experiment with written constitutionalism, a concept which it borrowed from continental Europe and from the United States. In 1889, the Meiji Emperor of Japan, who was an absolute dictator, promulgated the Meiji Constitution of Japan, which governed that country from November 29, 1890 until May 2, 1947. The Meiji Constitution provided for a form of mixed constitutionalism coupled with absolute monarchy. It was deliberately modeled on Bismarck's Constitution of the German Empire, which was in effect in 1890 when the Meiji Constitution went into effect. It could be said that, by promulgating the Meiji Constitution, the Meiji emperor constitutionalized his charisma in Professor Ackerman's terms.

The Meiji Constitution provided for a parliamentary government in Japan with an elected lower house of parliament, which in turn elected a prime minister who was the head of the government. The emperor of Japan was the ceremonial head of state, and he was above the law of the Meiji Constitution. It also created an independent judiciary with no power of judicial review.

There was a bicameral legislature with a popularly elected lower house and an upper house of peers, which resembled the British House of Lords. Sovereignty resided in the emperor and not in the people of Japan. The document did strikingly contain a qualified bill of rights as well as a citizens' bill of duties. The emperor had the sole right to declare war and peace and could dissolve the lower house at any time and call for new elections. The lower house was elected by all male Japanese citizens who owned a small amount of property. In 1910, Japan invaded and annexed the county of Korea.

The 1919 Treaty of Versailles, which ended World War I, did not recognize various Japanese territorial claims, and it led to an ardent growth of militarism and later of fascism in Japan. In the 1920s, Japan embarked on a major program of building up its navy and, by the 1930s, fascists came to power in the government of Japan. Japan eventually invaded China and Manchuria. The invasion of China began on July 7, 1937. President Franklin D. Roosevelt responded to Japanese aggression in China by ending U.S. oil shipments to Japan, which left that country very dependent on other Asian oil-producing countries and on oil imported from the Middle East. Japan did not control the sea lanes to the Middle East. As a result, FDR's embargo on U.S. oil shipments to Japan was a major cause of the fascist government of Japan's military attack on the U.S. fleet in Pearl Harbor, Hawaii, where it was headquartered.

In any event, the written Meiji Constitution of Japan, which contained no Madisonian systems of checks and balances and no judicial review of the constitutionality of legislation was easily subverted into a fascist regime. That fascist regime launched the military attack on Pearl Harbor, which brought the U.S. into World War II. Japan by then had allied itself with Hitler's Germany and Mussolini's Italy. After the U.S. declared war on Japan following Pearl Harbor, Nazi Germany declared war on the United States allowing FDR to come finally to the rescue of the British who were being besieged by the Nazis and with whom FDR was eager to be allied militarily.

In 1912, Sun Yat-sen overthrew the Emperor of China and established a democratic republic on the mainland of China. Also in 1912, a written Provisional Constitution of the Republic of China was drawn up and put into legal effect. This document governed the Republic of China until 1928, and it provided for a parliamentary system of government headed by a weak president. Sun Yat-sen was president of China for two months in 1912, and he was premier of the Kuomintang Party from 1919 to 1925, when he died.

In 1916, China descended into a state of chaos, which ended in 1928 when the Kuomintang Party, under Chiang Kai-shek, established its control over all of China. The Kuomintang Party promulgated a written Provisional Constitution of the Political Tutelage Period on May 5, 1931. Under this document, the Kuomintang Party operated as a one party system with complete control over mainland China. On December 25, 1947, the Kuomintang Party agreed with the Chinese Communist Party on a written constitution for

mainland China, but the communists boycotted the subsequent government. By 1949, the Kuomintang Party had been expelled from the Chinese mainland by Mao Ze Dong and governed only the island of Taiwan. The 1947 Constitution was thus only in effect on Taiwan after 1949.

In Asia, as in continental Europe, governments in Japan and China constitutionalized their charisma in a written constitution without a Madisonian system of checks and balances and without judicial review of the constitutionality of legislation. These written constitutions in pre-1945 Japan and China both failed and devolved into authoritarian rule.

#### *D. The Latin American Experience Prior to 1988*

As a result of the Napoleonic Wars, the Portuguese ruling monarch fled to Brazil, which he governed until 1815 when he returned to Portugal leaving his son behind to act as regent in Brazil. The son declared Brazil independent of Portugal in 1822, and he declared himself to be the emperor of Brazil with the title Dom Pedro I. Sixteen days later, Dom Pedro I set in motion a process under which Brazil adopted its first imperial written constitution. This constitution recognized four powers of government: the legislative, executive, judicial, and moderating powers. The emperor held both the executive and the moderating power, and he also appointed the upper house of the Brazilian legislature. This written undemocratic constitution remained in place until the emperor was overthrown in 1889, and the Constitution of the Old Republic of 1891 was adopted. That document was a virtual copy of the U.S. Constitution, but without the safeguards against presidential power afforded by the U.S. Constitution, as I will explain further below.

Meanwhile, in 1808, with the Spanish monarchy in exile, Simon Bolivar led a campaign for independence in the Spanish-speaking parts of South America, which began in Venezuela and which spread from there to Columbia, Bolivia (which is named after Bolivar), Ecuador, Peru, and Panama. Venezuela achieved *de facto* independence from Spain in 1810-1813, it was recaptured by Spain, but became independent again in 1819. Bolivar went on to conquer Spanish forces in Columbia, Bolivia, Ecuador, Peru, and Panama. The independence of these countries was consolidated between 1825 and 1830. He wrote a "Bolivian Constitution," which copied the U.S. Constitution's separation of powers, but which created an all-powerful national government and an all-powerful President—Simon Bolivar. Simon Bolivar thus, in Professor Ackerman's terminology "constitutionalized his charisma." In 1830, Bolivar died, and his empire disintegrated into the modern day centralized nation states of: Venezuela, Columbia, Bolivia, Ecuador, Peru, and Panama. Most of these countries were government by popular strongmen—*caudillos*—who called themselves presidents, mimicking the U.S. Constitution.

Mexico became independent of Spain in 1821, and it adopted its most recent written constitution in 1917, which is modeled on the U.S. Constitution, creating three branches of the national government and independent, self-

governing states. In practice, however, since the Mexican Constitution of 1917 did not provide for midterm elections and since it gave the President a non-renewable six year term, Mexico was a presidential dictatorship under the control of the Institutional Revolutionary Party until the end of the 1990s. Mexico had a written constitution from 1917 on, but it only became a democratic republic in the last twenty years.

Brazil became independent of Portugal in 1822, as a constitutional monarchy with an emperor who was all-powerful. Brazil adopted seven written constitutions—all modeled disastrously on the U.S. Constitution—between 1824 and the adoption of the current eighth democratic constitution of Brazil in 1988. In the 1824 Constitution of the Brazilian Empire, Emperor Dom Pedro I constitutionalized his charisma. The Brazilian empire was abolished in 1889, following a military *coup d'état*, and the country was a presidential dictatorship for most of its history. As with Mexico, Brazil copied the U.S. Constitution's federalism and separation of legislative, executive, and judicial power. Brazil did not, however, copy the U.S. practice of holding midterm elections every two years; it had much weaker state governments than did the U.S.; it did not develop congressional oversight committees with subpoena power; and judicial review did not work in Brazil because, as a civil law country, Brazil's lower courts would not follow judicial review precedents arrived at by the Supreme Federal Tribunal. Thus, from the end of the Empire in 1889, to the adoption of the current democratic written Constitution of 1988, Brazil was ruled either by a presidential dictator or by military strongmen who seized power in various *coups d'état*. Written constitutionalism was tried in Brazil, as it was tried in Mexico and by Simon Bolivar, but due to the selective copying of the U.S. Constitution, the Latin American written constitutions of the nineteenth and twentieth centuries did not produce democracy until long after 1945.

Argentina became independent of Spain in 1818, but it descended into a series of civil wars, which ravaged the country until 1861. Written constitutions based on the U.S. Constitution were produced and failed in 1819 and in 1826. Eventually, between 1853 and 1866, a permanent written constitution, based on the U.S. Constitution, with a separation of powers and meaningful federalism was established. Argentina flourished between 1866 and 1939 as waves of educated European immigrants settled there. Unfortunately, Argentina did not copy the U.S. system of midterm elections; it did not have powerful legislative oversight committees; and it did not have a meaningful system of judicial review because precedent was not binding in the country, which was a civil law jurisdiction. Partly as a result, Juan Peron was elected president of Argentina from 1946 to 1955, and again from 1973 to 1974. Peron turned the country into a presidential dictatorship along with his wife Eva Duarte. In between the Peron presidencies, there was a military *coup d'état*, and Peronism became a form of fascism in Argentina. After Peron's death, there followed yet another brutal military dictatorship.

Argentina, today, has a written constitution, which was amended in 1898, 1949 by Peron, 1957, and finally becoming the current democratic written Constitution of 1994. Since 1994, Argentina has been governed by a series of strongmen presidents, some from a Peronist party and some from the opposition. All of these presidents, except for the two most recent presidents, began their tenures by firing or impeaching all Supreme Court justices appointed by their predecessors. President Macri broke with that practice in 2015, but it will take one or two more successor presidents not firing the Supreme Court before one could say with any confidence that Argentina is again a constitutional democracy.

Finally, the Latin American country of Chile became independent of Spain in 1818 and was an authoritarian country until 1891 when a written constitution redistributed power between the president and congress, creating a parliamentary style democracy. There was a period of military rule from 1924 to 1932, but, from 1932 until 1973, Chile was a stable constitutional democracy until the United States, under the disgraceful rule of President Richard M. Nixon, overthrew the socialist government of Salvador Allende. Chile was governed by a brutal military dictator, Augusto Pinochet, until a new president was elected in 1988. Chile became a presidential, separation of powers regime under Pinochet, and its written constitution today follows that model. Chile has been a constitutional democracy for the last thirty years.

In sum, Latin America had written constitutions in which Simon Bolivar and the Brazilian emperor Dom Pedro I constitutionalized their charisma, but these written constitutions all failed to survive even though they were all modeled on the U.S. Constitution. These constitutions failed because they did not copy the Madisonian system of checks and balances with: 1) midterm elections to the legislature; 2) territorial legislative districts with a first-past-the-post electoral system, as opposed to proportional representation; 3) powerful legislative oversight committees armed with subpoena power; 4) judicial review by life tenured judges of federal legislative and executive acts; and 5) powerful state governors elected during the midterm year when the party in control of the executive branch always loses elections. The problem with the Latin American plagiarists of the U.S. Constitution was not that they set up presidential, separation of powers systems as Professors Juan Linz and Bruce Ackerman have claimed. The problem is that the Latin American plagiarists failed to plagiarize critical aspects of the U.S. constitutional system, which check and balance presidential power.

#### *E. The Countries of the British Empire from 1607 to 1945*

We saw above in Section A that the thirteen original American states adopted systems of judicial review of the constitutionality of legislation from their colonial experience of being subjected to judicial review of the legality of their colonial laws by the Privy Council to the King of England. The same process was at work in the British Empire, especially after the Privy Council



was reformed and modernized in 1833. The 1833 reforms were written by the great Whig reformer, Lord Brougham, who also shepherded the 1832 electoral reforms through Parliament, eliminating the rotten boroughs, and who led the successful effort to abolish slavery in the British Empire in 1833.

Lord Brougham secured the passage of the Judicial Committee of the Privy Council Act of 1833 by the imperial British Parliament, which reformed the Privy Council in the following ways. First, the 1833 Act provided that only highly experienced barristers who were law lords could sit on the Judicial Committee of the Privy Council (JCPC). Second, the 1833 Act provided that there should always be experts on the civil law, Islamic law, and Hindu law on the JCPC who could knowledgeably decide cases involving these other non-British common law legal cases. Third, the 1833 Act specified that retired colonial judges with expertise in native law could hear cases involving such law. Fourth, the 1833 Act provided that the Judicial Committee should deliver only one *per curiam* opinion with no concurrences or dissents allowed. Fifth, and finally, the 1833 Act made it clear that the decisions of the JCPC were binding upon his majesty the king who had to approve them without altering them in any way. These reforms transformed the Privy Council into a high power Supreme Court of the British Empire, which had the last word on the constitutionality of national and provincial or state laws enacted under the Canadian Constitution Act of 1867; the Australian Constitution Act of 1901; the South African Constitution Act of 1910; and the Government of India Act of 1935.<sup>8</sup>

From 1833 until 1945, the JCPC heard and decided thousands of cases from: Canada, British India, Australia, South Africa, and Palestine, once it became a British Mandate.<sup>9</sup> The JCPC had a permanent impact on the constitutional law of all of the countries for which it served as a final court of appeals. For example, in Canada, the renowned Canadian legal scholar Peter W. Hogg explains that the JCPC left a permanent imprint on Canadian federalism by interpreting the powers of Canada's provinces much more broadly and the powers of Canada's national government much more narrowly than a reasonable reading of the Canadian Constitution Act of 1867 would have suggested.<sup>10</sup> Professor Hogg's book chapter makes it clear that Canada inherited not only the written Constitution Act of 1867 from the United Kingdom, but also, ironically, the idea of federalism and separation of powers judicial review of the constitutionality of national legislation. This is ironic because the United Kingdom, itself, did not have judicial review of acts of Parliament or the monarch, but the U.K. exported that idea to the thirteen

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8. P.A. HOWELL, *THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 1833-1876: ITS ORIGINS, STRUCTURE AND DEVELOPMENT* (1979).

9. See, e.g., BONNY IBHAWOH, *IMPERIAL JUSTICE: AFRICANS IN EMPIRE'S COURT* (2013); ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* (2006).

10. See Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 55 (Jeffrey Goldworthy ed., 2006).

original American colonies, to Canada, and to every other part of its empire, which at its zenith encompassed one-quarter of the whole world. It was said at the time that the sun never set on the British Empire.

Australia also inherited the idea of a written Constitution and of judicial review of both federal and state legislation, as well as executive branch actions, from the United Kingdom. The Australian Constitution Act of 1901, which is Australia's written Constitution, was, like the Canadian Constitution Act of 1867, originally a statute written by the imperial British Parliament. Both acts delimit federal and state/provincial enumerated powers and impose a separation of judicial power from the fused parliamentary executive-legislative entities, which they create. Australia's Constitution has no bill of rights whereas Canada added the Charter of Rights and Freedoms to its Constitution in 1982, when the British Parliament finally terminated its power to legislate for Canada. Queen Elizabeth II remains the Queen of both Canada and of Australia, although she is represented as head of state by Canadian and Australian picked Governors General.

Australia has traditionally interpreted its constitution in a very formal and literal way because that is how the British courts and the Privy Council interpreted legislation and constitutions from 1920 on.<sup>11</sup> Australia thus, like Canada and the United States, inherited both the idea of a paramount written constitution and the idea of federalism and separation of powers judicial review of the constitutionality of federal legislation from the United Kingdom. Again, this outcome is ironic because the United Kingdom, itself, has no written constitution and only since the Human Rights Act, 1998 has the U.K. had judicial review of the constitutionality of acts of the U.K. parliament.

India also inherited the idea of a written judicially enforced federal constitution from the U.K.'s Privy Council experience. The framers of the Constitution of India, however, made it clear that they wanted to depart from the so-called Westminster Parliamentary Sovereignty model by adopting a U.S.-style bill of rights that would be enforced by the courts of India against both the federal and state governments, acting either through their legislatures or their executives. Initially, the Supreme Court of India behaved very cautiously, but as I will explain further below, after the Indira Gandhi state of emergency, the Supreme Court of India became very activist.<sup>12</sup> India had extensive experience from 1833 to 1947 with JCPC judicial review of the constitutionality of its laws.<sup>13</sup>

South Africa also had a limited experience with JCPC constitutional review of its laws from 1910 to the adoption of the Statute of Westminster in 1931.

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11. See Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 8, at 106.

12. See S. P. Sathe, *India: From Positivism to Structuralism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 8, at 215.

13. P.A. HOWELL, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1833-1876 (1979).

South Africa terminated Privy Council review of its laws upon obtaining its independence, and, under the post-1948 apartheid regime, South Africa had no judicial review of the constitutionality of legislation and no bill of rights, having opted for the Parliamentary Sovereignty U.K. model. I will discuss the recent experience in South Africa below.

Finally, Palestine, which included Israel, Jordan, and the Gaza strip, was subject to JCPC judicial review from 1923 to May 15, 1948, when the state of Israel declared its independence.<sup>14</sup> Aharon Barak, a former president of the Supreme Court of Israel and a renowned legal scholar, has told me that this common law period in Israel's pre-independence history had a profound effect on the high status of Israeli judges and made it more feasible for him to introduce judicial review of the constitutionality of Israeli legislation in the 1990s. In Israel, as in several other countries, the U.K. helped instill the idea of judicial review of the constitutionality of legislation.

## II. THE RISE OF WORLD CONSTITUTIONALISM IN INDIA, SOUTH AFRICA, ITALY, FRANCE, POLAND, AND IRAN

It should by now be clear that there was a "rise in world constitutionalism," in Professor Ackerman's words, from 1789 to 1945.<sup>15</sup> Continental Europe, parts of Asia, and Latin America were all awash with written constitutions prior to 1945. What makes the post-1945 rise in world constitutionalism, which Professor Ackerman discusses, so interesting and so unique is that it was accompanied by a rise in: 1) judicial review of the constitutionality of legislation, 2) by a rise of bills of rights, as well as by 3) a rise of systems of checks and balances. This can be illustrated by briefly discussing the constitutional experience of some of the main countries Professor Ackerman discusses in *Revolutionary Constitutions*.

### A. India

Professor Ackerman is absolutely right to stress that it was a charismatic "mass political movement," in the form of the Congress Party, led first by Mahatma Gandhi and then by Jawarlal Nehru, both charismatic leaders, that created the written Constitution of India. But, as Professor Ackerman knows, Gandhi and Nehru did far more than that. They also added to the Indian Constitution a very long and full bill of rights and a set of directive principles, concerning social and economic rights, that made the Indian Constitution quite revolutionary when it went into effect on January 26, 1950. B.R. Ambedkar, the primary author of the Constitution of India, was an untouchable under the Hindu Caste System, and he wrote a revolutionary document that reflected his admiration of the U.S. Constitution from his days as a graduate student, spent at Columbia University in New York City. Ambedkar got advice from U.S.

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14. See LIKHOVSKI, *supra* note 7, at 67-77.

15. See ACKERMAN, *supra* note 1.

Supreme Court Justice Felix Frankfurter on the writing of the Indian Constitution, and it was unanimously understood when the Indian Constitution was adopted that the Supreme Court of India would have the power of judicial review both of the structural and of the individual rights portions of the new constitution.

India, in 1950, thus joined the United States, as a country with judicial review of all aspects of the constitutionality of legislation and not just federalism and separation of powers judicial review, which existed in Canada and Australia at that time. The Bill of Rights of India was understood from the beginning to be enforceable through judicial review of all national and state legislation and executive orders. After Indira Gandhi declared a state of emergency and assumed dictatorial powers in the 1970s, the Supreme Court of India had the public backing to: 1) assert the power to judicially review the constitutionality of constitutional amendments; 2) assert the power to dominate the process of appointing new justices to the Supreme Court of India; and 3) assert the power to assume jurisdiction over even matters raised only in a letter to the editors of an Indian newspaper. The Supreme Court of India is thus by far and away the most powerful supreme court in the world. It has more than enough power to check and balance the prime minister of India and his majority in the lower house of India's bicameral legislature.

The Supreme Court of India, however, is not the only check and balance on the power of a national prime minister, backed by a majority of the lower house. There is also some power vested in the upper house of the Indian legislature, which represents the states and union territories, and which is always in session even during states of emergency. There is also some power vested in the governments of the states and union territories, which are often controlled by the opposite political party from the one in power at the national level. Since the *S.R. Bomai v. Union of India*<sup>16</sup> decision in 1994, the national government has had only limited power to interfere with and replace state governments of the opposite political party. Thus even aside from the very formidable powers of judicial review, which the Supreme Court of India had acquired by the 1980s, there are also other meaningful checks and balances in the Constitution of India as it has been applied.

The lesson to be learned from India is not merely one of the rise of a written constitution, but also one of: 1) the rise of an unbelievably powerful system of judicial review and 2) the creation of an intricate and effective system of checks and balances. The Indian system of checks and balances is different from the U.S. Madisonian system described in *The Federalist Papers*, but it is just as real and just as effective.

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16. (1994) 2 S.C.R. 664 (India).

### B. South Africa

Professor Ackerman's second example of "the rise of world constitutionalism" is South Africa, which he correctly describes as being the product of a charismatic "mass political movement" led by Nelson Mandela, a charismatic leader, and his African National Congress Party and its Freedom Charter of 1955. Once again, what is distinctive about the South African experience since the 1990s is not only that South Africa has a written constitution, but also that it has a bill of rights, which is judicially enforceable against the national legislature and executive, and that it has a working system of checks and balances. The South African Constitution creates a Constitutional Court of South Africa that is so powerful that it judicially reviewed the South African Constitution before that document ever went into effect. The South African Constitutional Court and Bill of Rights borrow significantly from the German and Canadian Bills of Rights and Constitutions, and the Constitutional Court is more than powerful enough by itself to constitute a meaningful check and balance on the president and bicameral legislature of South Africa.

The South African Constitution divides and checks and balances power by having a bicameral legislature and nine provinces, but the division between the president and the Constitutional Court are the main checks and balances in the South African Constitution. For more than twenty years now, South African democracy has been alive and well, which is far better than, for example, the record of the First and Second French Republics or of Weimar Germany. Again, South Africa's system of checks and balances is different from the U.S. Madisonian system, but it is just as effective and just as real.

### C. Italy

Italy adopted its Constitution on December 22, 1947, and, as Professor Ackerman claims, it was the product of a mass political resistance to fascism, which came to power after the Allies conquered Italy in World War II. What is distinctive about the Italian Constitution is that, unlike the *Statuto Albertino*, it is not interpreted and enforced by the Italian Parliament, but it is instead interpreted and enforced by the Constitutional Court of Italy, which came into existence in 1955. The Italian Constitution, moreover, unlike the *Statuto Albertino*, contains a very generous classical liberal bill of rights, as well as recognizing some important socio-economic second generation constitutional rights.<sup>17</sup>

It is quite clear that between 1955 and 2018 the Italian Constitutional Court, which can judicially enforce both the structural and the rights-protecting features of the Italian Constitution at both the national and the regional level, is a real powerhouse. The Constitutional Court has more than enough power to

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17. VICTORIA BARSOTTI ET AL., *ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT* (2015); VALERIO ONIDA ET AL., *CONSTITUTIONAL LAW IN ITALY* (2013).

check and balance the prime minister of Italy, who must uniquely have a majority in both houses of the bicameral national legislature. The Italian Constitution also checks and balances power by giving non-negligible powers to the president of Italy, who is slightly more than a ceremonial head of state, and by dividing power evenly between both houses of its national legislature. The Italian regions also have a bit of power, although not much, and the independent Court of Cassation and Council of State for civil, criminal, and administrative law cases also have some power. Moreover, Italian voters sometimes play a role in constitutional amendments or on questions such as the legality of abortions in national referenda. Italy thus has a vibrant system of its own checks and balances, which is different from the U.S. Madisonian system, but which works and is effective.

#### D. France

Professor Ackerman describes in separate chapters the French experience with constitutionalism under both the Fourth and Fifth Republic constitutions, and he ascribes the cause of both to be a national charismatic *mass popular movement*. Professor Ackerman correctly identifies the *mass popular movement* behind the Constitution of the Fourth Republic, which he seems to have an inexplicable, to me, affection for. The Constitution of the Fourth Republic was almost identical to the Constitution of the Third Republic, which the Nazis obliterated in 1940.

The main difference was that the Constitution of the Fourth Republic had a preamble that recognized both the constitutional status of the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789 and some second generation socio-economic rights circa 1945. These rights protections were, however, meaningless in practice, since the Constitution of the Fourth Republic did not create a court with the power of judicial review. The Constitution of the Fourth Republic was to be enforced by the French parliament, like the Constitution of the Third Republic. The only check and balance was a weak upper house of the legislature called the Senate. This was not a meaningful check and balance at all.

The lower, all-powerful house of parliament of the Fourth Republic, which elected the premier was elected using a radical system of proportional representation, which led to a ten party system and to weak coalition governments that were constantly falling due to votes of no confidence. This system was so weak that it collapsed in 1958 because of a crisis in then-French occupied Algeria and threats of a military *coup d'état*. Just as the Third Republic was no match for Adolf Hitler in 1933, the Fourth Republic was also no match for a serious foreign policy crisis in Algeria. It seems to me that a constitution which cannot provide ordered liberty is not a very good constitution. The Constitution of the Fourth Republic suffered from all the flaws that characterized liberal written constitutions prior to 1945 outside of the United States, Canada, Australia, and Switzerland.

Professor Ackerman rightly identifies the Constitution of the Fifth Republic as having been created by a charismatic *mass popular movement* led by Charles De Gaulle, the former military leader of the French Resistance during World War II. The Constitution of the Fifth Republic has grown organically over time from 1958, when its basic features were created, until 2008, fifty years later, when its Constitutional Council emerged as a full-fledged Constitutional Court. I will focus my remarks on the Constitution of the Fifth Republic as it now exists, sixty years after it was created. This constitution is now closing in on the seventy year record of the Constitution of the Third Republic as the longest lasting and most stable constitution in French history.

The current Constitution of the Fifth Republic divides power between a president, who has some decree law-making powers, and the National Assembly, a majority of which elects the premier and his cabinet. Both the president and the National Assembly ordinarily serve a five year term, and the recent practice has been to elect a new National Assembly about one month after a presidential election. This has reduced the likelihood of gridlock due to co-habitation where one party controls the presidency and the other party controls the National Assembly. Co-habitation did occur when French presidents served a seven year term prior to 2000. Nonetheless, even when the president and the premier are from the same political party, they each have their own electoral mandate. This helps to check and balance power.

An attentive reader will have noticed by now that France currently has a two party system instead of the ten party system it had under the Fourth and Third Republics. This is because no one can be elected president without receiving 51% of the national vote, which has always required a run-off presidential election between the two highest vote getters in the first election. Members of the National Assembly are also elected in two stage elections in territorial districts of the same kind that are used in the U.S. and in the U.K. The effect of this has been to empower moderates and to disempower the extremes. The radical right French National Front, for example—the party of Marine Le Pen—received 33.9% of the vote in the most recent French presidential election and 13% of the vote in the most recent National Assembly election. It won only 8 out of 577 seats thanks to France's quite sensible electoral system, which checks and balances power against extremists quite admirably.

Power in France is further checked and balanced by an increasingly formidable Constitutional Council, which gained power in 1971, 1974, and 2008. Today, the Constitutional Council can enforce the 1789 Declaration of the Rights of Man and of the Citizen, and it polices the boundary line between presidential power and the power of the National Assembly. There is also an upper house of the French legislature, the Senate, which must usually approve constitutional amendments by sitting in a congress with the National Assembly by a three-fifths vote. A number of useful constitutional amendments have been passed in this way during the last sixty years.

All in all, France under the Fifth Republic, has, since 1958 joined the world's constitutional democracies in having: 1) a meaningful system of judicial review; and 2) in having a meaningful set of checks and balances. French presidential power is still too great, in my opinion, but France does have more of a system of checks and balances than it has ever had before in its history.

### *E. Conclusion*

Professor Ackerman has a chapter in *Revolutionary Constitutions* on Poland, which he claims is a constitutional democracy, but, while Poland has a written Constitution and divides power between both houses of a parliament, I do not believe it is any longer a constitutional democracy because of the recent purge of the Polish Constitutional Court carried out by the ultra-right-wing Catholic government of that country. Poland is a classic case of a pre-1945 country with a written constitution and bill of rights but without an independent judiciary. I do not count such countries as being constitutional democracies that follow the rule of law. Other examples of such countries include Argentina and Turkey.

Professor Ackerman also has a fascinating Chapter on the Constitution of Iran, which does divide and check power between a guardian council, the president, and the parliament. Here again, however, the Guardian Council tightly controls who can run for president, and there is no independent court system exercising a power of judicial review. The Constitution of Iran is interesting for a study of authoritarian regimes, but I do not think it is helpful to understanding constitutional democracies.

The bottom line is that *Revolutionary Constitutionalism* is very helpful, but the key things to look for in assessing whether or not a country is a constitutional democracy are: 1) the presence of an independent court system that follows the rule of law and which has the power of judicial review over national and state legislative and executive acts and 2) the existence of a meaningful system of checks and balances, which might be quite different from the U.S. Madisonian system of checks and balances. By those criteria, 15 of the G-20 nations stand out as constitutional democracies: 1) the U.S.; 2) the U.K.; 3) France; 4) Germany; 5) Japan; 6) Italy; 7) India; 8) Canada; 9) Australia; 10) South Korea; 11) Brazil; 12) South Africa; 13) Indonesia; 14) Mexico; and 15) the European Union. It is to those countries' systems of judicial review, which I will now turn.

### III. THE ORIGINS AND GROWTH OF JUDICIAL REVIEW SINCE 1945

In 1945, only three countries—the United States, Canada, and Australia—had judicial review of the constitutionality of federal legislation. Of those three countries, only the U.S. Constitution had a judicially enforceable bill of rights in 1945. Canada did not add a serious judicially enforceable bill of rights until 1982, and Australia does not have one down to the present day. In



1945, both Canada and Australia were committed to the British doctrine of parliamentary sovereignty except in federalism cases or in separation of powers case to protect judicial independence. Switzerland in 1945 had judicial review of the constitutionality of laws passed by its cantons (i.e. state governments), but it did not have judicial review of federal legislation. The United States was thus the only country in the world in 1945 with a judicially-enforceable bill of rights in which the courts had the power to strike down federal laws as being unconstitutional.

In my forthcoming two volume book series, *The History and Growth of Judicial Review in the G-20 Constitutional Democracies*, I show the causes of the origin and growth of judicial review in the G-20 nations, which are constitutional democracies. I have identified four major causes of the origins and growth of judicial review of the constitutionality of federal legislation under bills of rights, as well as enforcing federalism and separation of powers partitions of power. I will describe each of those causes in a paragraph below. I will then identify two other possible causes of the birth of judicial review. Finally, I will briefly (for space reasons) discuss each of the fifteen G-20 constitutional democracies and will explain the causes of the birth and growth of judicial review in those countries.

#### A. Causes of the Growth and Origins of Judicial Review

The first major cause of the birth and growth of judicial review of the constitutionality of federal and state legislation is the need for an *umpire* in countries which have a federal system of government. Professors Mauro Capelletti, Martin Shapiro, Barry Friedman, Erin Delaney, and I have all written about this phenomenon. Once one limits and enumerates national and state powers either a supreme court or a constitutional court has to police the limitations and enumerations. The need for a federalism *umpire* has caused judicial review of the constitutionality of national legislation to originate and grow in a number of countries.

For the same reasons, Professors Martin Shapiro and I have also argued when a constitution sets up a national separation of powers system, as do the constitutions of the United States and France, an *umpire* is needed to police the enumerated and separated powers of different branches in a national separation of powers system. The need for a separation of powers *umpire* has caused judicial review to originate and grow in a number of countries. These countries include: the United States, France, and the nations of Eastern Europe, which modeled their constitutions on France's as well as such parliamentary democracies as India, Canada, and Australia, where notwithstanding the fusing of the executive and legislative powers the Supreme Court polices the independence of the judicial power in a separation of powers way.

The second major cause of the birth and growth of judicial review is the *rights from wrongs* phenomenon described by Allan Dershowitz in *Rights from*

*Wrongs: A Secular Theory of the Origins of Rights*.<sup>18</sup> Professor Dershowitz argues that constitutional *rights* are historical in their origins, and do not arise from natural law, but arise instead when a great *wrong* is committed, is widely recognized to have been a *wrong*, and so a constitutional *right* arises in its place. Examples include: the British use of general warrants giving rise to the U.S. Fourth Amendment; the Holocaust in Germany giving rise to a huge rights culture in that country's constitution; and racial apartheid, in South Africa, giving rise to a very rights protective constitution there.

A third major cause of the birth and growth of judicial review is *borrowing* the institution from other countries that have it, and then tailoring it to fit local circumstances. Judicial review in the federalism and separation of powers context was *borrowed* by Canada and Australia from the U.S.; and in other contexts U.S. judicial review was also *borrowed* by Brazil and Mexico while German judicial review was *borrowed* in the 1920s by Czechoslovakia and Austria. India directly borrowed the idea of a judicially enforceable Bill of Rights from the United State in 1950 setting an example for all nations writing post-1950 constitutions. Most recently, South Africa *borrowed* ideas from the German and Canadian experience in setting up its system of judicial review. *Borrowing* is thus a major factor in the origination and growth of systems of judicial review.

A fourth cause of the birth and growth of judicial review is the existence of a systems of checks and balances so the supreme or constitutional court does not, as in Japan, face off against a unitary, non-federal regime, with a fused parliamentary executive/legislative majority government. Judicial review works best in settings where political power is diffused among multiple political actors through a system of checks and balances, bicameralism, the separation of powers, federalism, and the holding of mid-term elections. In the U.S., the Supreme Court has political space in which to act because democratic power is divided among the president, the senate, the house of representatives, and the fifty state governments. There is nothing like this system of checks and balances in Japan, which is one reason why judicial review has not worked in Japan.

Professor Ran Hirschl argues that judicial review is born out of the desire of a *fading hegemonic elite to entrench its values* in a judicially policed constitution as it is losing political power. Ran Hirschl argues that judicial review originated in this way in South Africa in the 1990's; in Canada, in 1982; in Israel, in the 1990's; and in New Zealand.<sup>19</sup> I disagree with Professor Hirschl based on the country studies in my forthcoming two volume book on *The History and Growth of Judicial Review*.

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18. ALLAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* (2005).

19. RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004).

Professor Tom Ginsburg argues that judicial review is born because even in two party systems members of both parties want to ensure that their fundamental rights will be protected even when they are out of power politically. This phenomenon is identified as being a desire for “insurance and commitment” by Professor Tom Ginsburg in *Judicial Review in New Democracies*,<sup>20</sup> which he claims explains the origins of judicial review in South Korea in the 1980s; in Taiwan; and in Mongolia. I disagree with Professor Ginsburg on his claim that a desire for *insurance and commitment* explains the origins of judicial review in the countries he studies. I argue in *The History and Growth of Judicial Review* that that institution almost never originates for “*insurance and commitment*” reasons, although it may well grow in power and be retained for those reasons.

This then concludes my discussion of the birth and growth of judicial review except that I should add that this discussion relates to Professor Ackerman’s book *Revolutionary Constitutions*, wherein he discusses the *mass popular movement* as the engine of the constitutionalization of judicial review in the countries he studies in that book. I agree with him that charismatic *mass popular movements* were at work in the countries Professor Ackerman studies and during the time periods Professor Ackerman mentions. I would add that I think in each of those instances the *mass popular movement* arose because of a great *wrong*, in Professor Dershowitz’s language, and that led to the constitutionalization of great *rights*. I will briefly explain how Professor Ackerman’s typology blends with the phenomenon I describe in my two volume book series.

Professor Ackerman quite correctly describes the Congress Party of India as a *mass popular movement* that constitutionalized its charisma. I agree and think it was the great historical *wrong* of British colonial oppression of India which led to the *rights* protective Constitution of India being adopted, and it was the great historical wrong of Indira Ghandi’s State of Emergency that empowered the Supreme Court of India to become much more activist. Similarly, Professor Ackerman quite correctly describes the African National Congress Party of South Africa as being a *mass popular movement* that constitutionalized its charisma with its call for the Freedom Charter of 1955. I again agree and think it was the great historical *wrong* of racial apartheid that led to the origins of judicial review in that country.

With respect to France under the Fourth Republic and Italy after World War II, Professor Ackerman argues that it was charismatic *mass popular movements*, which had resisted fascism, which constitutionalized their charisma in those countries post-1945. I agree with Professor Ackerman and think it was the great historical *wrong* of fascism that gave origin to judicial review constitutionalism with lots of *rights* in both of those two countries. A similar process occurred with respect to Poland where the great historical

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20. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003).

wrong of Stalinist communism led after the collapse of the Berlin Wall to a written, and judicially enforceable Bill of Rights and Constitution as a great right.

The final *mass popular movement*, which Professor Ackerman discusses in his book, *Revolutionary Constitutions, Volume I*, is Gaullism, a movement led by former General Charles De Gaulle, a flawed, charismatic leader who wrote France's Constitution of the Fifth Republic in 1958. In that Constitution, as subsequently amended, De Gaulle constitutionalized both his own and his movement's charisma. Gaullism was, if we accept De Gaulle's premises, a *rights from wrongs* phenomenon. In De Gaulle's view, the French Third Republic, which lasted from 1870 to 1940, had a fatally weak executive branch, which failed to stop Hitler when he came to power in Germany and could easily have been stopped prior to the Nazi rearmament of Germany. Also, in De Gaulle's view, the French Fourth Republic, which lasted from 1946 to 1958, had a fatally weak executive branch and an excessively weak electoral law, which failed to stop an attempted *coup d'état* by the French military in 1958 due to a costly colonial war over independence in Algeria. The strong presidential constitutional structure of the French Fifth Republic, and its total repudiation of proportional representation, was thus due to a *mass popular movement* with a charismatic leader who, in his own mind, was acting for *rights from wrongs* reasons.

## B. The Fifteen G-Twenty Constitutional Democracies

### 1. The United States

Judicial review originated in the United States during the colonial period between 1660 and 1776 when the English king's Privy Council reviewed and either approved or rejected proposed colonial laws, depending on whether or not they were "repugnant to the laws of England." The colonists could depart from English law where local circumstances dictated that they do so, but not otherwise. As a practical matter, the thirteen original U.S. colonies were used to having an English Court, the Privy Council, engaging in a form of federalism *umpiring*. Between 1776 and 1787, Professor Gordon S. Wood has persuaded me that there was a huge change in American's views of judicial power. American judges were given life tenure for the first time from 1776 on and, by the 1780s, the colonialists were urging their state supreme courts to strike down unconstitutional laws.

Americans knowingly embraced judicial review when they ratified the U.S. Constitution because Alexander Hamilton said in *The Federalist* No. 78 that the U.S. Constitution provided for and required judicial review. Every exercise by the Supreme Court of the power of judicial review that I am aware of from 1789 to 1861 involved either federalism or separation of powers *umpiring* except for Contract Clause cases

The post-Civil War Reconstruction Amendments—especially the Fourteenth Amendment—and critical federal civil rights laws and a statute giving federal district judge federal question jurisdiction in 1875 greatly expanded the power of the federal courts. This expansion in federal judicial powers of judicial review occurred for *rights from wrongs* reasons. The enslavement of African Americans, and the passage in southern states in 1865 of discriminatory Black Codes, were a great historical *wrong*, which the Reconstruction Amendments and statutes, generally, were meant to correct. Judicial Review was thus born again after Reconstruction in a new and more powerful form.

There was also an element of *elite hegemonic entrenchment* behind the adoption of the Fourteenth and Fifteenth Amendments. The proponents of those amendments were worried that once the eleven Confederate states were re-seated in Congress there might come a time when anti-civil rights democrats would outnumber pro-civil rights republicans and would repeal the Civil Rights Act of 1866. Thus, the Fourteenth Amendment was enacted to ensure this never happened.

To compress radically, a *mass popular movement* took place on behalf of the proposition that “separate, but equal,” treatment of the races was allowed by the Fourteenth Amendment prevailed during the Social Darwinist era from 1883 to 1945. This is, as Michael McConnell has rightly called it “America’s Forgotten Constitutional Moment.” Whereas most intellectuals in the 1780’s believed that all men were created equal, most intellectuals, in 1900, thought that man had evolved from apes; that some races of men were better than were other races of men; and, that, in Rudyard Kipling’s words, Americans should take up “the white man’s burden” and rule the Philippines, just as the U.K., France, and Germany were ruling Africa and Asia. The horrors of the Holocaust and of Nazism shattered Social Darwinism forever. The U.S. written *Universal Declaration of Human Rights* begins by saying “All human beings are born free and equal in dignity and rights.” After 1945, racist colonial empires were illegitimace, and race discrimination in the U.S. Armed forces was held illegitimate in 1948 and in public schools in 1954.

The U.S. Supreme Court during Franklin D. Roosevelt’s lifetime was a Thayerian, highly deferential body.. From 1937 to 1954, the rational basis test almost always carried the day in the Supreme Court, and judicial review in the United States was almost dead.<sup>21</sup> This is shown by six of the eight New Deal Supreme Court justices joining the horrendous, racist Thayerian judicial restraint holding in *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* is the poster child of New Deal constitutionalism. No matter how egregious the violation of rights the New Deal justices would just defer to the

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21. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (rational basis test in sex discrimination cases); *United States v. Korematsu*, 323 U.S. 214 (1944) (rational basis test on war powers used against U.S. citizens on U.S. soil); *Wickard v. Filburn*, 317 U.S. 111 (1942) (rational basis test on scope of national power under the Commerce and Necessary and Due Process Clauses).

political branched and in partiaulr to FDR who had appointed eight out of nine justices on the Supreme Court.

The Thayerian choke-hold on judicial review from 1937 to 1952 ended when the Supreme Court by a vote of 6 to 3 struck down the seizure of private steel mills by President Harry Truman, F.D.R.'s successor, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). From 1954 to 1969, a *mass popular movement* to secure equal civil and voting rights for African Americans emerged, and the Supreme Court spoke as the mouthpiece of this movement in its unanimous repudiation of the separate but equal idea in 1954 in *Brown v. Board of Education*, which held race discrimination in public schools to be unconstitutional.<sup>22</sup> This *mass popular movement* culminated with congressional passage of: 1) the Civil Rights Act of 1964, which forbade both race and sex discrimination; 2) the Voting Rights Act of 1965, which re-enfranchised African American voters; 3) the acceptance that affirmative action to help African Americans and later women was needed; 4) the right to racial intermarriage recognized by the Supreme Court in *Loving v. Virginia*;<sup>23</sup> 5) a shift during the 1970's in Supreme Court caselaw to give heightened scrutiny to sex discrimination; and 6) a cultural shift on the rights of same sex couples that began in 1969 but was not finally codified by the Supreme Court until *Obergefell v. Hodges*<sup>24</sup> in 2015. Between 1952 and 1969, most of the federal Bill of Rights was incorporated to apply against the states. Individual rights judicial review was thus reborn during this period of time.

From 1969 to 2021, the New Deal rational basis test for reviewing the constitutionality of federal and state legislation was replaced by a reasonableness test, in my opinion; in federalism cases from 1991 to 2021; in separation of powers cases from 1976 to 2021; and in unenumerated constitutional and enumerated constitutional rights cases from 1965 to 2021. Meanwhile, freedom of expression has become the ultimate constitutional value. From the Supreme Court's decision in *Roe v. Wade*,<sup>25</sup> in 1973, up until today, the Court's protection of constitutional abortion rights for women has been constant, and I think will continue to be constant.

A mass political movement begun by President Ronald Reagan, in 1981, and, continued, methodically by the two Bush presidents, and by former President Trump, has led to a temporary 6 to 3 Republican majority on the Supreme Court, as of January 2021. Some U.S. Democrats may want to go the way of Poland and pack the Supreme Court themselves in revenge.

There is a better way out for the rule of law. First, the current six Republican justices should make it clear that they will not vote to cut back on

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22. 347 U.S. 483 (1954). See also BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION (2014).

23. 388 U.S. 1 (1967).

24. 135 S. Ct. 2584 (2015).

25. 410 U.S. 113 (1973).

either abortion rights or the rights of LGBTQ+ people. And, second, the best long-term solution would be for the United States to adopt a constitutional amendment creating fixed 18 year terms for Supreme Court justices, with one seat opening up on July 1<sup>st</sup> during the first and third years of each presidential term. This would guarantee that every one term president would get two appointees, and every session of the Senate would confirm one appointee.

Judicial Review in the United States arose for: 1) *umpiring* reasons; and 2) *rights from wrongs* reasons in 1868 and 1870. Judicial review died from 1937 to 1952 thanks to James Bradley Thayer, but it was born again from 1952 to 2021 for *umpiring* and *rights from wrongs* reasons in *Youngstown* and in *Brown*, respectively. The growth of judicial power from 1952 to 2021 probably also results from: 3) the U.S. system of checks and balances, which allows the Court political space within which to maneuver in between separately elected presidents, senates, houses of representatives, governors, and bicameral state legislatures.

## 2. France

Judicial Review originated in France in 1958 for separation of powers *umpiring* reasons. Charles De Gaulle's 1958 Constitution, as amended in the 1960s, created a separately elected president of France, with decree law-making power, and a National Assembly of France, a majority of which would elect the premier and the cabinet with the power to make laws. A nine member Constitutional Council was created to *umpire* disputes between the president and the National Assembly.

The French Constitutional Council greatly enhanced its power in 1971 in its widely praised *Freedom of Association*<sup>26</sup> decision striking down as unconstitutional a conservative government's refusal to allow a left wing group to organize. In that decision, the Constitutional Council announced it had the power to enforce the 1789 French Declaration of the Rights of Man and of the Citizen, as well as fundamental principle of the Republic, thereby giving France a judicial enforceable bill of rights. Both the 1971 court decision and the 1789 Declaration of Rights were the products of a *rights from wrongs* process.

In 1974, the Constitution of the Fifth Republic was amended to give sixty members of either the National Assembly or of the otherwise weak French Senate standing to challenge a law *before it was promulgated* before the Constitutional Council on constitutional grounds. Prior to 1974, only four high officials of the government had standing to challenge laws before the Constitutional Council, rendering that body very weak. The 1974 expansion in standing was promoted by President Valéry Giscard D'Estaing, a classical liberal, governing in alliance with a larger Gaullist majority. The 1974

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26. Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 16, 1971, J.O. 7114 (Fr.).

parliament had four major parties: 1) the Gaullists; 2) the followers of Giscard D'Estaing; 3) the Socialists; and 4) the Communists. In this environment, all four parties wanted to expand judicial review for *insurance and commitment* reasons. No one party was dominant, and no one knew what the next election would bring. Expanded judicial review was thus in everyone's best interest.

The 1974 expansion of judicial review by giving sixty members of either the National Assembly or the Senate standing to sue before a law was promulgated meant that every law was challenged for constitutionality, which turned the Constitutional Council into a powerful, co-equal, third house of the legislature.<sup>27</sup> Eventually, in 2008, the ordinary court of cassation, which has the last word on criminal and civil cases, and the council of state, which has the last word on administrative law matters, were required by a constitutional amendment to allow ordinary litigants to raise constitutional issues concerning laws that were already on the books, which the ordinary courts were bound to refer for decision to the Constitutional Council. This huge expansion in judicial review occurred primarily because France wanted to *borrow* similar successful uses of judicial review in ordinary cases in countries like Germany, Italy, and Spain.

French judicial review emerged for: 1) separation of powers *umpiring* reasons; 2) *rights from wrongs* reasons in 1971; 3) *insurance and commitment* reasons in 1974; and 4) *borrowing* reasons in 2008.

### 3. Germany

The German Constitution, or Basic Law, emerged in 1949 primarily for *rights from wrongs* reasons in response to the horrors of the Holocaust and the Nazi dictatorship of Adolf Hitler. The Basic Law *begins* with a comprehensive bill of rights, which itself contains an unamendable protection of human dignity in all its various permutations. Fundamentally, and at its core, the German Basic Law and the creation of German judicial review of the constitutionality of both federal and state legislation and executive actions occurred for *rights from wrongs* reasons.

A distinctly secondary, facilitating cause of the origins of judicial review in German is that the Basic Law contemplates the Constitutional Court playing a significant *umpiring* role in federalism and separation of powers cases. The Constitutional Court has played such a role in practice.

Third, and finally, judicial review in Germany using the Concentrated Court model was *borrowed* from the constitutions of Czechoslovakia and Austria as designed by the famous legal scholar Hans Kelsen. Concentrated Court models of judicial review empower only one constitutional court to enforce the constitution and not thousands of lower federal and state court judges as in the United States. Germany improved on the Kelsenian Model by allowing for vigorous judicial enforcement of individual liberties under its bill of rights. In

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27. ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE (1992).



addition, the members of a constitutional court serve for a fixed term of years—twelve years in Germany—and they are picked by special political processes. In Germany half of the Constitutional Court justices are elected by a two-thirds vote of a plenum of the lower house of the legislature, while the other half are elected by a two thirds vote of the upper house of the legislature in which state government officials sit as members having both federal and state offices simultaneously. A final feature of the Concentrated Court model is that the rulings of such a court have *erga omnes* effect. This means they bind other courts in Germany and the legislatures and executives in Germany as a constitutional command. This feature of Concentrated Court judicial review makes such courts especially appealing in countries that have civil law system and are not used to the concept of binding judicial opinions and decisions.

Judicial review in Germany from 1949 to 2018 has been hugely successful. Public opinion polls consistently reveal that the Constitutional Court ranks higher than any other part of the German government in popularity. This is to some extent a result of the fact that ordinary citizens have standing to bring constitutional complaints about any matter, which they wish to raise before the Constitutional Court. The Court has struck down as unconstitutional more than six hundred laws or executive actions since it was established in 1951, and the Court vigorously protects enumerated constitutional rights; unenumerated constitutional rights; federalism; and the separation of powers. The *borrowing* of the Kelsenian idea has been very, very successful. Germany has become a better model, than is the United States, as to how to make judicial review work in other civil law countries such as continental Europe, Asia, Africa, and Latin America.

#### 4. Italy

The Italian experience with the origins of judicial review is very similar to the experience in Germany after Hitler. Italians after Mussolini wanted a full bill of rights at the start of their Constitution, and the principal cause of the birth of judicial review in Italy, which did not go into effect until 1955, was a *rights from wrongs* dynamic. Italy had experienced grievous *wrongs* as a result of fascism and the Holocaust, and the judicially enforceable bill of rights was a response to those *wrongs*. Italian communists and socialists made their approval of judicial review contingent on the bill of rights protecting second generation social entitlements, and so those rights came into being as well. Italy took some time getting judicial review up and going, which did not happen until 1955, but from its first important decision on, the Italian Constitutional Court undertook the process of scrubbing Italian law free of fascist legislation, which was still on the books.

As in Germany, a secondary cause of the origins of judicial review in Italy was the need for an institution to *umpire* between the co-equal Houses of the bicameral parliament and the government; between the government and the

president of the Republic; between the parliament and the president of the Republic; between the high court of cassation, which hears criminal and civil cases, and the council of state, which hears administrative law matters; between the regions and the national government; and, finally, in supervising popular referenda. *Umpiring* is not the primary reason why Italy has judicial review, but there is no doubt that the court plays a valuable *umpiring* role.

A third, and final cause of the origination of judicial review in Italy is that the multiple political groups that Professor Ackerman describes at the Italian Constitutional Convention may have wanted for *insurance and commitment* reasons to guarantee certain basic rights when they were not in power politically. Post World War II Italy, from 1946 to 1991, had a multi-party system with a large Christian Democratic Party; Classical Liberal Parties; a Socialist Party; and the West's largest and most tame Communist Party. Given this party system, any one party, other than the Christian Democrats, expected sometimes to be opposed to the government so those entities, along with the Communist Party, which could not enter the government until 1991, all had an incentive to favor the birth and growth of Italian judicial review. The Italian system of checks and balances, like the different German system of checks and balances, favored the growth of judicial review.

Italy then originated and experienced the growth of judicial review for: 1) *rights from wrongs* reasons; 2) *umpiring* reasons in a system of checks and balances; 3) reasons of *insurance and commitment*; and 4) because Italy's system of checks and balances left political space within which the Constitutional Court could act.

### 5. Japan

General Douglas MacArthur imposed the current constitution of Japan on Japanese elites following the amending process of Japan's prior Meiji Constitution. The Constitution can only be amended by a two thirds vote of both houses of the legislature and subsequent majority ratification of any amendment in a national election by a majority of Japanese voters, and no constitutional amendments have ever been adopted. While the current conservative Japanese government would love to scrap Japan's western liberal constitution, Japanese voters will not approve of such a move. As a result, the government of Japan is stuck with a constitution it does not like and which it cannot change.

MacArthur's Constitution contains an ample and generous bill of rights and confers the power of judicial review on the Supreme Court of Japan and on inferior courts. Judicial review appears in the Constitution of Japan because MacArthur *borrowed* the institution from the U.S. Constitution. MacArthur did not set up a Concentrated Court Kelsenian system like Germany's or Italy's because he was probably unaware of this as an alternative to the Diffuse U.S. model of judicial review, and he probably did not realize that a Kelsenian

system with citizen standing would have been more suited to Japan, which is, like Germany, a civil law nation.

The Supreme Court of Japan has only held eight laws unconstitutional in its seventy-year history. I think this is because Japan is a unitary nation state, with a parliamentary government fusing legislative power and a one party political system. The Supreme Court of Japan does not have the political space a court needs to make judicial review work.

## 6. India

Judicial review originated in British colonial India in the same way in which it did in colonial North America. From 1858 to 1947, British government over India was centralized in the prerogative powers of the monarch as exercised executively by the viceroy of India and as exercised judicially by the Judicial Committee of the Privy Council (JCPC). Under the Colonial Laws Validity Act 1865, the imperial colonies could not adopt laws that were repugnant to the laws of England or to other acts of the British parliament.

This is the same standard of review, which the Privy Council had used with the thirteen North American colonies between 1660 and 1776. As a result, India experienced a long period of time between 1858 and 1931 during which it became quite accustomed to having an imperial Supreme Court, the JCPC, scrutinizing the legality of Indian laws under imperial British law. This experience helped to pave the way for origins of judicial review of the constitutionality of legislation.<sup>28</sup> P.A. Howell, *The Judicial Committee of the Privy Council, 1833-1876*.

The British also set up many High Courts initially staffed by British barristers in major Indian cities to hear cases and appeals from those courts could be taken to the JCPC in London. By the 1930s, it became clear that the British Empire was winding down, and the Statute of Westminster 1931 repealed the Colonial Laws Validity Act 1865, thus freeing the Indian legislature elected under the Government of India Act 1935 to legislate in ways that were openly contrary to British law. By 1947, all but two judges on one Indian High Court were native Indian barristers. The process of decolonization was thus in many ways complete when India formally declared its independence from Britain in 1947.

Colonial India had dozens of separately administered states and 565 Princely States covering 48% of the territory of colonial India prior to independence in 1947. Federalism was thus a part of the way of life in British India. In turn, when British India ceased to exist four new nations came to exist as of the present day: India, Pakistan, Bangladesh, and Myanmar. India today has twenty-nine states and seven Union territories, and, although it has a very powerful national government, which can in emergencies devolve state governments, India does have today a federal system, which means it does

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28. HOWELL, *supra* note 13.

need a federalism *umpire*, especially since the Indian states are very litigious and sue each other a lot. Moreover, the Indian courts are highly activist common law courts that strike down any separation of powers intrusion on their judicial power. There is thus vigorous separation of powers *umpiring* that goes on in India on a truly vast scale.

One cause then of the origins of judicial review in India is: 1) the historical practice of British *umpiring* judicial review; 2) the federal structure of India, which often requires *umpiring* between two states when they sue each other, which happens often; and 3) separation of powers *umpiring* in which Indian courts have: 1) successfully claimed the power to declare unconstitutional certain constitutional amendments; 2) successfully claimed the power of the justices of the Supreme Court of India to pick their own successors; and 3) successfully eliminated all standing rules, which might otherwise have constrained judicial power.

The most important cause of judicial review in India, however, is not *umpiring*, but instead, the *rights from wrongs* phenomenon. This phenomenon has played out twice in Indian history over the course of the twentieth century. First, when India declared independence from Britain in 1947, most Indians justifiably believed that the British were racist, colonial oppressors who sucked their country dry of labor and goods all for the benefit of the British Isles. Indians believed that the British had committed great *wrongs* and the many *rights* in the very lengthy Indian Bill of Rights were put there to make sure those *rights* would never again be violated.

India's decision to write a constitution with a written bill of rights, which was judicially enforceable by the Supreme Court of India against all levels of government and all government officials, was an enormous departure from the British Westminster Model of Parliamentary Sovereignty. In adopting a judicially enforceable bill of rights, India *borrowed* from U.S. constitutional law, which was well known to Dr. B. R. Ambedkar, the framer of the Indian Constitution. Dr. Ambedkar was an untouchable who had received a PhD from Columbia University in New York. He greatly admired the U.S. Bill of Rights and our system of judicial review of the constitutionality of federal and state legislation, and he quite successfully imported them into India. The goal in doing so was to prevent the *wrongs* of racism, colonialism, or of other abuses of power from ever happening again.

This alone was enough to get judicial review up and running in India from 1950 until Prime Minister Indira Gandhi's state of emergency, in the 1970's. During this time, the Supreme Court of India frequently exercised its power of judicial review, but not in any very dramatic way. The state of emergency and the break in democratic rule under Indira Gandhi, however, was perceived by most Indians as a grave *wrong*, which required a *much more powerful system of judicial review*. After the end of the state of emergency, the Supreme Court established the power: 1) for judicial review of the constitutionality of constitutional amendments; 2) for the Supreme Court Justices to pick their own

successors; and 3) for assertion of jurisdiction over any matter, even if raised only in a letter to the editor of a newspaper without regard to traditional rules of standing. The judicial review power of the Supreme Court of India thus not only originated because of a *rights from wrongs* process; it also grew enormously thanks to a *rights from wrongs* process.

India is not a country where two co-equal political parties have agreed on judicial review for *insurance and commitment* reasons. It is also not a country where *fading hegemonic elites* sought in 1947 to entrench their values in the Constitution for fear they would someday lose power. To the contrary, India has been governed by the founding Congress Party for most of its history.

Judicial review in India thus originated and grew for: 1) *rights from wrongs* reasons; 2) *umpiring* reasons; 3) because of *borrowing*; and 4) because governmental power in federal India with its bicameral legislature and ceremonial president is sufficiently diffused to leave political space in which the courts can act.

### 7. Canada

From the British North America Act 1867 until the abolition of appeals to the Privy Council in 1949, Canada was governed as a British colony until 1931 and the decisions of the Canadian Supreme Court were appealable to the Judicial Committee of the Privy Council (JCPC) until 1949. Canada thus grew up with the same experience as had the United States and India of JCPC judicial federalism *umpiring* among matters, which were handled at the British imperial level; matters that could properly be handled at the national Canadian level; and matters that could be handled at the Canadian provincial level. The JCPC adopted a very literal, formal reading of the British North America Act 1867, as it then was called, which read Canadian national powers very narrowly and Canadian provincial powers very broadly. That caselaw has been accepted and built upon by the Supreme Court of Canada since it was freed of JCPC review in 1949.

In addition to engaging in federalism *umpiring*, the JCPC also *umpired* separation of powers disputes, and the Supreme Court of Canada continues down to the present day to *umpire* both separation of powers and federalism cases. There is thus no question at all that Canadian judicial review originated in 1867 and grew until 1982 for *umpiring* reasons. Since 1982, the Canadian Supreme Court has continued to play *umpire*, but it has assumed a much more powerful role as the guarantor of the Canadian Charter of Rights and Freedoms, a document which it has interpreted to produce outcomes Americans might associate with the Earl Warren Supreme Court.

Former Prime Minister Pierre Trudeau engineered some major changes in 1982 to the Canadian Constitution. Trudeau's mission was to "patriate" the Canadian Constitution by permanently ending the authority of the British Parliament over Canada. Instead of declaring independence from the U.K., as the United States and India had done, Trudeau persuaded the U.K. Parliament

to pass a series of statutes applicable to Canada in 1982. The first statute created a Charter of Rights and Freedoms for Canadians, which was judicially enforceable with second look judicial review. The second statute created a complex amending process whereby Canada could itself amend its constitution without having to ask the U.K. Parliament to amend it for Canadians. The third statute renamed the British North America Act 1867 to be instead the Canadian Constitution Act 1867. The fourth and final statute ended once and for all any U.K. sovereignty over Canada except for the continuing role of Queen Elizabeth II as the queen of Canada, represented there by her Canadian governor general.

The 1982 constitutional changes were supported by the nine English speaking provinces but not by the French speaking province of Quebec, which wanted and did not get constitutional recognition that it was a co-equal Founding Society of Canada. Professor Ran Hirschl argues in *Towards Juristocracy*<sup>29</sup> that the enormous increase in the judicial review power of the Supreme Court of Canada, effectuated by adopting the Charter of Rights and Freedoms, would disproportionately benefit English-speaking Canada and hurt Quebec, which had only three seats on the Supreme Court of Canada. Professor Hirschl argues (implausibly to me) that the real motivation behind the adoption of the Canadian Charter of Rights and Freedoms in 1982 was a desire by a *fading anglo-phone elite to hegemonically entrench* itself in power as Quebec separatism was starting to crest.

I think Canadian judicial review was deliberately expanded from the *umpiring* context in 1982 to the *rights* context for two reasons. First, Prime Minister Pierre Trudeau was himself of French Canadian origin, and he was the father of the system of everything being bilingual in Canada. This excellent bilingual system seems to have in the end eliminated Quebec's desire to secede from Canada. But, I suspect that Pierre Trudeau, prior to becoming Prime Minister Trudeau, experienced discrimination or hardship caused by English-speaking Canadians against himself, as a French-speaking Canadian. The *wrongs* the English committed in Canada are mild compared to the *wrongs* they committed in India, but it is out of those *wrongs* that I think the idea of a charter of *rights* was born. There is thus a *rights from wrongs* story to be told about the expansion of Canadian judicial review in 1982.

Second, Trudeau was a great admirer of the Warren Court and its judicial activism, and he wanted to *borrow* that for Canada by adopting a Charter of Rights and Freedoms to be enforced in a purposive way by the Supreme Court of Canada. Trudeau was successful in creating a Warren Court in Canada. The *borrowed* institution took root and grew hugely. Today, Canadians have unlimited abortion rights; the right to keep a brothel and to be a pimp; and the right to assisted suicide. The Canadian Supreme Court has gone way beyond the U.S. Supreme Court especially in recent years.

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29. HIRSCHL, *supra* note 16.

Canadian judicial review thus originated and grew for: 1) *umpiring* reasons; 2) *rights from wrongs* reasons; 3) *borrowing* reasons; and 4) because power is sufficiently diffused by federalism and a bicameral national legislature, so that the Canadian Supreme Court has the political space within which to act.

#### 8. Australia

Judicial review of the constitutionality of legislation originated in Australia prior to 1901 because the Judicial Committee of the Privy Council (JCPC) had final jurisdiction to hear appeals from the highest courts of the six Australian states including the power to adjudicate whether those state's legislatures were exceeding their powers under their colonial charters. After the adoption of the Australian Constitution Act 1901, the JCPC had the last word on all cases decided by the High Court of Australia, which is the supreme national court of that country.

The Australian Constitution Act 1901 contains no bill of rights and no such document has ever been adopted in Australia as of 2018. As a result, judicial review originated and grew in Australia solely for federalism and separation of powers *umpiring* reasons. In addition, a working system of checks and balances through federalism and bicameralism at the national legislature, with a powerful upper House of the legislature, gives the High Court of Australia the political space to act. None of the other causes of the origination and growth of judicial review apply to Australia except that the Australians *borrowed* the idea of judicial review from the U.S. Constitution, which was a partial model for the Australian Constitution.

Judicial review in Australia thus emerged for *umpiring*, *borrowing*, and checks and balances reasons.

#### 9. South Korea

Judicial review emerged in South Korea in the 1980s when that country finally became a constitutional democracy after decades of rule by three dictators who called themselves presidents. South Korea is a civil law country with a German style constitutional court, a unicameral legislature and a separately elected president who can be impeached by the legislature and removed from office by the Constitutional Court. Two South Korean presidents have been impeached. The first one was acquitted by the Constitutional Court, but the second one was quite recently removed from office by the Constitutional Court leading to new presidential elections, which the opposition leftist party won. The South Korean Constitutional Court is obviously quite powerful in exercising its powers of judicial review and in having removed an elected president of the country.

Judicial review and a bill of rights appeared in South Korea for *rights from wrongs* reasons after more than forty years of brutal dictatorship and rights violations, in my opinion. Professor Tom Ginsburg, who is an expert on Asian studies, has written that judicial review also emerged in South Korea because

two roughly co-equal political parties engaged in *insurance and commitment*. I defer to his judgment on that. The Korean Constitutional Court is also *borrowed* from the German example for a civil law country, and it also engages in a minimal amount of separation of powers *umpiring*. South Korea may have wanted to *borrow* judicial review to reassure international investors, the IMF, and the World Bank that it was safe to invest money in South Korea. In addition, the Constitutional Court plays umpire between the president and the unicameral national legislature.

Judicial review thus emerged and grew in South Korea for *rights from wrongs*, *insurance and commitment*, *umpiring*, and *borrowing* reasons.

#### 10. Brazil

Judicial review emerged in Brazil in its second constitution adopted in the 1890s because the whole constitution was *borrowed* from the U.S. Constitution. Brazil is a federal regime with weak states, and it also has a separation of legislative, executive, and judicial powers at the national level as well as separate constitutional status for municipalities as well as for the states. There thus has always been a need for a federalism and separation of powers *umpire* in Brazil.

Brazil wrote its current constitution in 1988, and it went into effect in the early 1990s. This constitution followed years of rights abusive military rule of the country, and there is a *rights from wrongs* aspect to the 1988 Brazilian Constitution, which has an unusually comprehensive bill of rights, which is judicially enforced by the Supreme Federal Tribunal, which is Brazil's highest court. The Supreme Federal Tribunal is both the head of a Diffuse U.S. model system of judicial review, and it is also a Kelsenian Constitutional Court with the power to bind actors in that civil law country with *erga omnes* rulings. The Brazilian Supreme Federal Tribunal is very powerful and active and is a response to the *wrongs* committed by the military dictatorship.

Judicial review in Brazil under the 1988 Constitution originated for *rights from wrongs* and *borrowing* reasons. Brazil *borrowed* judicial review first from the U.S. in the 1890's, and then from the German Kelsenian model. The Supreme Federal Tribunal has been especially active in the last ten years, which I attribute to the fact that it faces no strong fused parliamentary government. The division of power in Brazil between the president and the bicameral legislature and among the nation, the states, and the municipalities gives the Supreme Federal Tribunal a lot of scope within which to act. Extreme proportional legislation makes the lower house of the legislature unable to act at all. The Supreme Federal Tribunal has plenty of political space within which it can act.

#### 11. South Africa

Judicial review originated in South Africa in 1994 when the peace negotiations between the African National Congress (ANC) and the white



apartheid government settled on the creation of a written constitution, with an ample bill of rights, and with a German-style Kelsenian Constitutional Court. The negotiators settled on agreeing on a long list of principles prior to the drafting of the South African constitution. It was agreed astonishingly that the Constitutional Court would judicially review the final draft of the South African Constitution to make sure that it was in accord with the agreed upon constitutional principles. The Court did so, found a few deviations from the agreed upon principles, and the Constitution was revised accordingly. South Africa's Kelsenian Constitutional Court is thus very powerful, and it is the only court ever to pass on the constitutionality of a constitution.

The primary causes of the origins of judicial review in South Africa are two-fold. On the part of the ANC, the written constitution, the bill of rights, and the Constitutional Court were all created in response to the brutal, racist, totalitarian system of apartheid, which existed in South Africa from 1948 to 1992. For the ANC, which represented over 80% of South Africans, judicial review originated for *rights from wrongs* reasons and because of *borrowing* reasons. Since the ANC had the power to ignore the white minority in South Africa, these reasons must be considered as the dominant reasons for the origination of judicial review in that country. The ANC had favored a judicially enforceable Charter of Freedoms since 1955, and they finally got what they had been asking for all along in the 1990's.

For the white South African minority, judicial review originated, as Professor Ran Hirschl argues in *Towards Juristocracy*<sup>30</sup> for *fading elite hegemonic* reasons. White South Africans knew they would be only a small minority in the new South Africa so they were especially eager to create a bill of rights enforced by a powerful constitutional court. Since the 1990s, the Constitutional Court has grown in power, since it moderates or plays *umpire* between the 80% of the country, which is African in origin and the white and mixed race minorities.

Professor Ackerman describes South African constitutionalism as a product of a *mass popular movement* led by Nelson Mandela and the ANC. I agree with that, and I think if Mandela had wanted to ignore the white minority and ride roughshod over them he could have gotten away with that after the end of the Cold War in 1992. For whatever reason, that was not the course which Mandela chose to follow in constitutionalizing his own and the ANC's charisma. Mandela opted for a negotiated constitution and bill of rights with judicial review, which was acceptable to the white minority, and he even allowed the South African Constitutional Court to review for constitutionality the new South African Constitution. This behavior sent a powerful signal to the IMF and the World Bank that South Africa was a safe place for global investors to invest in.

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30. *Id.*

Judicial review in South Africa thus emerged for *rights from wrongs* reasons, and it has grown in power for *umpiring* reasons, and *insurance and commitment* reasons.

#### 12. *The United Kingdom of Great Britain and Northern Ireland*

The U.K. was historically wedded to the idea of parliamentary sovereignty and the Westminster model under which there was no bill of rights, no judicial review of the constitutionality of legislation since acts of parliament were acts of the sovereign, and which relied on the common law of England to protect liberty. From the 1980s until 1997, there was a heated debate in the U.K. over whether to adopt a bill of rights and judicial review, and, in 1997, Tony Blair's New Labor Party won a majority in the House of Commons on a platform, which pledged to give the U.K. a written bill of rights that was judicially enforceable. This was accomplished by the Human Rights Act 1998, which came into effect in 2000.

The Human Rights Act 1998, which is admirably described by Professor Stephen Gardbaum in *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013), incorporated into British law the European Convention on Human Rights, which is enforced by the European Court of Human Rights which sits in Strasbourg France and which has a very rights protective jurisprudence developed since the 1950s. This treaty document thus became the U.K.'s written bill of rights. The Human Rights Act 1998 provides in Section 3 that British courts shall construe British statutes and executive actions to be in accord with the European Convention on Human Rights, if it is plausible to do so. The British courts have bent over backwards, as Professor Gardbaum explains, to construe British statutes to comply with the European Convention on Human Rights. Section 4 of the Human Rights Act 1998 provides that if a British statute cannot plausibly be construed to comply with the European Convention on Human Rights then British courts must issue a Declaration of Incompatibility, which triggers a fast track process in the House of Commons to pass new legislation to cure the incompatibility. Parliament has to date cured every incompatibility found by the British courts except that it has not agreed to allow prisoners to vote as the European Court of Human Rights has held they can do. Accordingly, Britain today does have a working system of judicial review of the constitutionality of Acts of Parliament.

Judicial review emerged in the U.K. for *borrowing* reasons, because the U.K. was the only G-20 constitutional democracy, and the only common law country in the world, not to have a written bill of rights and judicial review, and British elites did not approve of this aspect of U.K. exceptionalism. In addition, Britain had a bad record of losing human rights cases before the European Court of Human Rights, so there was a mild *rights from wrongs* reason as to why the U.K. finally opted for judicial review. Finally, I think may be a third cause of the origination of judicial review in the U.K. The recent Miller cases of 2017 and 2019 suggest that the Blair government's

devolution of power to Scotland, Wales, Northern Ireland, and the City of London has created a need for a federalism and separation of powers *umpire*. This in turn strengthens the need for a U.K. Supreme Court.

In sum, the U.K. adopted a written bill of rights and a system of judicial review for *borrowing*, *rights from wrongs*, and *umpiring* reasons. Canada and the U.K. show that *rights from wrongs* violations need not be as massive as those which gave rise to what Ackerman calls a revolution on a human scale in order to get judicial review going. This is an important point, which I hope Ackerman will address in the next two books in his series.

### 13. Indonesia

From its independence after the end of World War II until 1998, Indonesia had a presidential separation of powers constitution, but it was in practice a sometimes brutal presidential dictatorship. Riots in 1998 brought democratic forces to power, and four critical constitutional amendments were adopted, which transformed Indonesia into a constitutional democracy with a Constitutional Court, federalism, and a greatly weakened presidency. The Constitutional Court is a Kelsenian court *borrowed* from the South Korean and German Constitutions, and it has been very powerful and effective. Amendments have added a written Bill of Rights to the Indonesian Constitution, which the Constitutional Court enforces.

Judicial review in Indonesia has been facilitated by the division and enumeration of power at the national level between the legislature, the term limited president, and the judiciary; and federalism with an enormous amount of decentralization of power in the amended Indonesian Constitution, all of which gives the Constitutional Court further room within which to maneuver. Indonesia's Bill of Rights and system of judicial review emerged primarily for *rights from wrongs* reasons because Indonesia experienced severe human rights violations when it was a presidential dictatorship, which it wanted never to repeat. Indonesia may also have opted for a written bill of rights and judicial review to encourage the IMF and the World Bank to favor international investment in the country. Finally, different parties in the legislature may have favored a written Bill of Rights for *insurance and commitment* reasons of the kind Professor Tom Ginsburg writes about.

Indonesia thus originated judicial review primarily for: 1) *rights from wrongs* reasons; 2) as a result of *borrowing*; and 3) because checks and balances left the Constitutional Court political space within which to act.

### 14. Mexico

Mexico operates under a 1917 written constitution and bill of rights with a Supreme Court that has both the Diffuse U.S. powers of judicial review and also the Concentrated Kelsenian powers of judicial review of a constitutional court. In this respect, it resembles the Brazilian model. Mexico's 1917 Constitution created a federal presidential separation of powers model with a

bicameral legislature and a federal structure with power divided constitutionally among: the national government, the state governments, and the municipal governments. However, until the year 2000, Mexico was run entirely by an authoritarian, dictatorial political party called the Institutional Revolutionary Party or PRI by its initials in Spanish. As a result, Mexico's separation of powers, federalism, and judicial review were meaningless prior to 2000 because the PRI held *all* of the levers of power, and it behaved like a presidential dictatorship. The only limit on power that Mexico followed prior to 2000 was that its presidents served only one non-renewable six year term. Mexico prior to 2000 was an authoritarian oligarchy with an all powerful president.

This began to change in the 1990s when PRI president, Ernesto Zedillo, started trying to democratize the country. Real change came, however, with the 2000 presidential election, which was won by President Vincente Fox in an election which the PRI lost. For the first time, Mexico had a president of one party and a bicameral legislature controlled by the PRI. Since 2000, Mexico has elected mostly non-PRI presidents and many non-PRI governors, becoming therefore a true constitutional democracy. Moreover, Mexico revamped its Supreme Court by cutting in half the number of justices and appointing to the Court independent-minded jurists who issue very progressive and independent decisions when exercising the power of judicial review. Mexico, today, has a real and independent system of judicial review of the constitutionality of legislation operating in an environment where power is decentralized by functional checks and balances.

Independent judicial review originated in Mexico to impress the IMF and the World Bank and to encourage investment in that country; as a result of *borrowing* from the U.S., Brazil, and Germany; because of the need for an *umpire* in Mexico's presidential separation of powers and federal system in which real power is reserved to the states and municipalities; and for what Professor Tom Ginsburg calls *insurance and commitment* reasons. There was no Ackermanian *mass popular movement*, which led to the post 2000 growth of judicial review and the Supreme Court's enforcement of Mexico's previously meaningless written bill of rights.

### 15. *The European Union*

Judicial review originated in the European Union entirely for federalism *umpiring* reasons. In two landmark cases in the 1960s, the European Court of Justice (ECJ), which is the highest court in the European Union issued two fateful decisions, which were simply accepted by the political powers of the nation states over a long period of time, which stretched from 1970 until 1989, that made up the EU even though those decisions were in no way clearly provided for by the treaty which set up the EU. First, the ECJ held that EU law had direct effect in the courts of the six nation states that then belonged to the EU. This meant that the numerous national courts systems were in essence

drafted by the ECJ to enforce directly EU law in national courts. This holding that EU law had *direct effect* in nation state courts was by no means obvious from reading the Treaty of Rome. Often when a nation signs a treaty and violates it, the other nations to the treaty ask the political branches of the nation in violation to cure the violation. The doctrine of direct effect skipped that step and said that national courts could themselves cure violations of EU law and could apply EU law. This was a momentous decision once it was gradually accepted by the EU member nation courts.

Second, the ECJ ruled shortly after adopting the doctrine of direct effect that, where there was a conflict between EU law and member nation state law, EU law was supreme and prevailed. This was also a momentous decision once the EU member states accepted it, which they have still not completely done. This step transformed the EU from being constitutionally a treaty organization into being a confederation in which the ECJ was the Supreme Court and the courts of the nation states were its arms and legs in implementing supreme EU law. In theory, EU law under this approach could even have trumped nation state constitutional law, although the Constitutional Courts of the nation states of Germany and Italy set limits on that process. EU law trumps statutes enacted after the EU treaties, which is conclusive evidence of its constitutional status. The net result is that there is today an unintended but real system of judicial review in the European Union that has grown up as a Hayekian spontaneous system of order to *umpire* federalism issues in the EU.<sup>31</sup>

My colleague at Northwestern, Karen Alter, has studied the emergence of judicial review as a result of the need for a federalism *umpire* in *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*,<sup>32</sup> and *The European Court's Political Power*.<sup>33</sup> The EU does have a fully functioning system of judicial review, which relies on the nation states courts acting under and accepting the supremacy of the ECJ on EU law matters. This system of judicial review did not emerge out of: 1) a *rights from wrongs* process; 2) a desire for *insurance and commitment*; 3) *borrowing*; or 4) *fading hegemonic elite entrenchment*. Judicial review in the EU emerged for one, and only for one reason, the need for a federalism *umpire*.

#### IV. CONCLUSION

I think that what is truly distinctive about the post-1945 experience of constitutionalism is not the written constitutionalization of charisma, which Professor Ackerman writes about, but is instead the written constitutionalization of judicial review of federal legislation, executive actions

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31. See FRIEDRICH HAYEK, LAW, LEGISLATION, AND LIBERTY, VOLUMES I, II, & III (1973).

32. KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001).

33. KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER (2010).

under written bills of rights, and of a Madisonian system of checks and balances. Written constitutions existed from 1776 in the newly freed American states until 1945, and so “the rise of world constitutionalism” is not itself a new development. What is distinctive about the post-1945 constitutions is that they have actually worked because they have been accompanied by “the rise of global systems of checks and balances” and by “the rise of global judicial review.”

The French Revolutionaries both in 1791 and in 1848 were a *mass popular movement*, which constitutionalized its charisma in written constitutions. Those written constitutions, however, failed, just as Germany’s Weimar Constitution failed, because of a lack of checks and balances and because of the absence of judicial review. Professor Ackerman does a beautiful job of describing the mass popular movements, which are discussed in *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*, but he fails to note the reasons why the post-1945 constitutions have mostly succeeded whereas the pre-1945 constitutions mostly failed. Between 1945 and 2021, the common law world rejected the Westminster Model in favor of the U.S. Model of judicial review, and the civil law world rejected France’s historical disapproval of judicial review in favor of the German Model of judicial review, which is now triumphant in all civil law nations, including France.